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In The
Supreme Court of the United States

VAN ELK, LTD., AND MORILLO CONSTRUCTION, INC.,

Petitioners,

v.

JOSE REYES, FRANCISCO REYES, JOSE PEREZ, AND CARLOS FLORES,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

PETITION FOR WRIT OF CERTIORARI

WILLIAM PERRY PENDLEY, ESQ.*
ELIZABETH GALLAWAY
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

ANDREW C. MUZI
DANA L. HARRIS
MUZI & ASSOCIATES
1851 East First Street, Suite 1257
Santa Ana, California 92705
(949) 553-9277

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the legal anatomy of a prevailing wage claim so closely resembles that of the backpay claim examined by this Court in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), that *Hoffman* should preclude illegal immigrants from recovering prevailing wages?

2. Whether the California Legislature's attempt to circumvent both this Court's ruling in *Hoffman* and Congress's enactment of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101 *et seq.* ("IRCA"), by declaring immigration status "irrelevant," violates the Supremacy Clause of the U.S. Constitution?

LIST OF PARTIES

Petitioners: Van Elk, Ltd., and Morillo Construction, Inc.

Respondents: Jose Reyes, Francisco Reyes, Jose Perez, and Carlos Flores

CORPORATE DISCLOSURE STATEMENT

Supreme Court Rule 29.6 requires every document filed on behalf of a nongovernmental corporation to contain a corporate disclosure statement. Pursuant to this rule, Petitioners Van Elk, Ltd., and Morillo Construction, Inc. each declare that they are privately-held companies and no parent or publicly held company owns 10 percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Van Elk, Ltd., and Morillo Construction, Inc. (collectively, "Van Elk"), hereby petition this Court for a *writ* of *certiorari* to review the judgment of the Court of Appeal of the State of California.

OPINIONS BELOW

On November 16, 2004, the Los Angeles Superior Court issued an opinion under docket number BC 302275, which is reproduced at App. 24-28. On March 14, 2007, the Court of Appeal, Second Appellate District, of the State of California issued its opinion. *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68 (Cal. Ct. App. 2007), App. 1-23. On June 13, 2007, the California Supreme Court denied Van Elk's Petition for Review. App. 29.

STATEMENT OF JURISDICTION

Title 28 of the United States Code provides the jurisdictional authority for this Court to review final judgments of the highest court of the States:

> Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or

> where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution. . . .

28 U.S.C. § 1257(a).

On November 16, 2004, the Los Angeles Superior Court filed an Order under docket number BC 302275, which is reproduced at App. 24-28. On March 14, 2007, the California Court of Appeal issued a judgment declaring that Respondents could maintain their claims for prevailing wages, and that California Labor Code section 1171.5 and two other identical and concurrently enacted statutes were not preempted by the Constitution.[1] App. 1-23. On June 13, 2007, the California Supreme Court denied Van Elk's petition for review of the judgment of the Court of Appeal. App. 29. On September 6, 2007, this Court granted Van Elk a 41-day extension to and including October 22, 2007. The judgment of the Court of Appeal is therefore final and this Court has jurisdiction to review this case by a *writ* of *certiorari*.

STATUTES INVOLVED

This Petition involves the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in

[1] For additional explanation of these statutes *see infra*, p. 2.

> Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, § 2, cl. 2.

This Petition also involves California Labor Code § 1171.5, which provides:[2]

> (a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals *regardless of immigration status* who have applied for employment, or who are or who have been employed, in this state.
>
> (b) For purposes of enforcing state labor and employment laws, *a person's immigration status is irrelevant* to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the

[2] California Government Code § 7285, and California Civil Code § 3339 each contain language identical to California Labor Code § 1171.5. All were adopted in response to this Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

> inquiry is necessary in order to comply with federal immigration law.
>
> (c) The provisions of this section are declaratory of existing law.
>
> (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(Emphasis added.)

This Petition also involves provisions of the California prevailing wage law, which require that:

> Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

Cal. Lab. Code § 1771.

In addition, the prevailing wage law establishes a civil fine for violations:

> (a)(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded,

> forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

Cal. Lab. Code § 1775.

Finally, the prevailing wage law establishes criminal penalties for violations:

> Any officer, agent, or representative of the State or of any political subdivision who willfully violates any provision of this article, and any contractor, or subcontractor, or agent or representative thereof, doing public work who neglects to comply with any provision of section 1776 is guilty of a misdemeanor.

Cal. Lab. Code § 1777.

STATEMENT OF THE CASE

Emil Vassileu was born in Pernik, Bulgaria, an area of western Bulgaria noted for its long history of coal mining, metallurgy, and engineering. In 1982 he arrived in the United States as a political refugee, seeking a better life than was available to him under Bulgaria's Communist regime. Mr. Vassileu immigrated

legally to the United States and settled in Cleveland, Ohio, where his engineering degree enabled him to find a job at a welding and structural engineering company. In 1985, Mr. Vassileu moved to Los Angeles, California, and started his own business, Van Elk Ltd., a welding and steel-working company that bids on both private and public works projects. Van Elk, Ltd. has grown to eight full-time employees and has enjoyed over two decades of success, due in large part to Mr. Vassileu's commitment to his company and his craft. Over the years, Mr. Vassileu has sought to teach his craft to those who work for him, which he did with the four individuals who ultimately brought this lawsuit.

Respondents filed their Complaint on September 11, 2003. Respondents sought the difference between what that they were paid and what they allegedly earned under prevailing wage law of California. *See* Cal. Lab. Code § 1773. But five of the eight projects identified by Respondents were not public works projects. They were purely private projects not subject to the prevailing wage laws. And Respondents' remaining three claims were for off-site work also not subject to the prevailing wage laws.

On July 12, 2004, Van Elk filed a Motion for Summary Judgment or in the alternative, Summary Adjudication arguing that Respondents' claims for unpaid prevailing wages were precluded by this Court's decision in *Hoffman*. In the alternative, Van Elk argued that the work in question was not subject to the prevailing wage law. On November 16, 2004,

relying on this Court's decision in *Hoffman*, the Los Angeles Superior Court granted Van Elk's Motion for Summary Judgment holding that, because Respondents were undocumented workers, they could not maintain an action for unpaid prevailing wages. App. 24-27. Respondents appealed. On March 14, 2007, the Court of Appeal of the State of California reversed the trial court's judgment. *See* App. 1-23.

The Court of Appeal stated that "California's prevailing wage law is a minimum wage law" and held that, because the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), did not preclude claims by undocumented workers, "for much the same reasons . . . *Hoffman* does not prohibit plaintiffs from having standing to raise claims for prevailing wages. . . ." App. 14-15. The Court of Appeal also held that California's post-*Hoffman* statutes were not preempted by federal immigration law. App. 22.

Van Elk submits that the Court of Appeal erred by applying FLSA precedent instead of the reasoning of *Hoffman*. App. 14-15. Had the Court of Appeal examined Respondents' prevailing wage claims in the manner contemplated by this Court in *Hoffman*, the Court of Appeal would have been compelled to apply *Hoffman* because both cases present similar circumstances. Moreover, the Court of Appeal upheld the California Legislature's post-*Hoffman* statutes despite the Legislature's intent to circumscribe this

Court's holding in *Hoffman* by deeming immigration status "irrelevant" in cases such as this one. *See* Cal. Lab. Code § 1171.5.

ARGUMENT

The unlawful employment of illegal aliens has been described by Congress as a "magnet . . . attract[ing] aliens here illegally" H.R. Rep. No. 99-682(I) at 46 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. With this in mind, in 2002, this Court terminated the ability of illegal aliens to sue for backpay, holding that such court-ordered awards were counter to "explicit statutory prohibitions critical to federal immigration policy as expressed in IRCA. . . ." *Hoffman*, 535 U.S. at 151. This Court recognized that an illegal alien could not work unless he or his employer violated federal immigration law. And authorizing an illegal alien to collect backpay as a result of such illegal conduct would therefore only perpetuate continuing violations of immigration law. *Id.* at 151-52. This Court also determined that federal enforcement and penalty provisions sufficiently deterred employers from violating labor laws, even absent the threat of lawsuits by illegal aliens. *Id.* at 152.

This Petition presents factual and legal circumstances analogous to those examined by this Court in *Hoffman*. Respondents are illegal aliens who seek prevailing wages under California law. Similar to the federal labor laws examined in *Hoffman*, California prevailing wage law deters violations through a

scheme of civil and criminal penalties. *See* Cal. Lab. Code §§ 1775, 1777. Van Elk submits that the factual and legal parallels between California's prevailing wage law, the backpay awards examined by this Court in *Hoffman*, call for the precedent of *Hoffman* be applied to this case. Specifically, *Hoffman* should foreclose the ability of Respondents, illegal aliens all, to collect prevailing wages. In the alternative, *Hoffman* should be extended to apply to the facts of this case.

Van Elk respectfully requests, therefore, that this Court grant *certiorari* to correct the California Court of Appeal's misapplication of *Hoffman*. Respondents' prevailing wage claims derive from a legal framework similar to that of the backpay claims extinguished by this Court in *Hoffman*. And Respondents claims, like the illegal aliens' claims in *Hoffman*, exist only as a result of a violation of federal immigration law. Despite these similarities, the Court of Appeal upheld Respondents' prevailing wage claims applying FLSA precedent, instead of *Hoffman*. This Court should correct this ruling and clarify that Congress intended, with its adoption of federal immigration laws, to bar illegal aliens from collecting prevailing wages.

Van Elk also submits that the California Legislature's statutory response to *Hoffman* violates the Supremacy Clause. U.S. Const., art. VI, § 2, cl. 2. In an audacious response to *Hoffman*, the California

Legislature enacted Labor Code § 1171.5, Government Code § 7285 and Civil Code § 3339 (collectively, the "post-*Hoffman* statutes"). These statutes, each with identical text, purport to limit the scope of *Hoffman* by making immigration status "irrelevant" to claims under California law. Cal. Lab. Code § 1171.5(a), Cal. Gov. Code § 7285(a), Cal. Civ. Code § 3339(a). This statutory scheme is preempted because it conflicts with the intent of Congress and frustrates federal law, and is ultimately preempted by the Supremacy Clause. While the Court of Appeal undertook a lenient analysis of Constitutional preemption doctrine to uphold these statutes, Van Elk submits that these statutes are insubordinate to federal law and deserve sharper analysis. These post-*Hoffman* statutes contradict federal law and should be overturned.

I. Under *Hoffman*, Illegal Immigrants May Not Maintain A Suit To Recover Prevailing Wages.

In *Hoffman*, this Court counterbalanced the objectives of federal labor laws against those of immigration laws to determine whether illegal aliens were entitled to sue to collect backpay. This Court recognized that federal labor laws exist to prevent and remedy unfair labor practices and that their enforcement would be impossible absent employer penalties and sanctions, including the remedy of backpay for wronged employees. *Id.* at 152. *See also NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969), *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904, n. 13 (1984).

This Court also recognized, however, that granting illegal aliens the same remedies as legal workers would both "trivialize the immigration laws" and violate Congress's intent in enacting the Immigration Reform and Control Act, 8 U.S.C. § 1101 *et seq.* ("IRCA"). *Id.* at 150.

With the IRCA, Congress sought to stop the payment of wages to unauthorized workers. H.R. Rep. No. 99-682(I) 46 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. When this Court analyzed *Hoffman*, it held that a violation of the IRCA occurs in one of two ways: "[e]ither the undocumented alien tenders fraudulent identification . . . or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations." 535 U.S. at 148. Thus, "[u]nder the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." *Id.*

To comply with the IRCA, an employer must prescreen applicants to confirm their work authorization, and may not knowingly hire an illegal worker. 8 U.S.C. § 1324a(a), (b). The employer is required to terminate a worker upon discovering that the worker is illegal. 8 U.S.C. § 1324a(a)(2). Moreover, an employer found to be in violation of the IRCA is subject to both civil and criminal penalties. 8 U.S.C. § 1324a(e), (f).

This Court, recognizing that Congress sought to stop the employment of illegal aliens, ruled in

Hoffman that illegal aliens could not collect backpay because to hold otherwise would frustrate congressional objectives regarding illegal immigration. *Hoffman*, 535 U.S. 148-53. For example, an illegal alien-plaintiff could qualify for an award of backpay "only by remaining in the United States illegally. . . ." and a plaintiff who "obeyed the law and departed to Mexico, would [lose] his right to backpay. . . ." *Id.* at 150. Similarly, an illegal alien-plaintiff could not lawfully mitigate damages, as required by the labor laws, because mitigation would require the individual to become employed, either by submitting fraudulent documents or by finding an employer who was willing to ignore his status – both violations of the IRCA. *Id.* at 151-52. By ruling that illegals could not recover backpay, therefore, Court adhered to the intent of Congress. *Id.* at 150.

This Court also recognized in *Hoffman* that absent the remedy of backpay, a "spur and catalyst" was needed to ensure employer compliance with the labor laws. *Id.* at 152. This Court held that "traditional remedies" in the Federal labor laws were sufficient, however, to ensure that employers followed the law:

> Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman. . . . These include orders that Hoffman cease and desist its violations. . . . Hoffman will [also] be subject to contempt proceedings should it fail to comply with these orders. We have

> deemed such "traditional remedies" sufficient to effectuate national labor policy regardless of whether the spur and catalyst of backpay accompanies them.

Id. (internal citations omitted).

Likewise, this case presents a tension between federal immigration law and California prevailing wage law. California prevailing wage law has an enforcement scheme that closely resembles that of the federal labor laws examined in *Hoffman*. *See* Cal. Lab. Code §§ 1775, 1777. Various civil and criminal penalties discourage employers from violating the prevailing wage law, and will continue to do so even absent the threat of lawsuits by illegal aliens to recover prevailing wages.

California prevailing wage law requires employers on taxpayer-financed construction projects to pay a "general prevailing rate" to workers based on their specialty. Cal. Lab. Code § 1773.2, *see also Lusardi Construction Co. v. Aubry*, 824 P.2d 643, 648 (Cal. Ct. App. 1992). Prevailing wages are based on "the general prevailing rate of per diem wages . . . in the locality in which the public work is to be performed. . . ." Cal. Lab. Code § 1773, *see also Div. of Labor Standards Enforcement v. Ericsson Info. Sys., Inc.*, 270 Cal. Rptr. 75, 77 (Cal. Ct. App. 1990). The California Department of Labor is empowered to pursue employers for any wage deficiency and may impose statutory penalty for violations. Cal. Lab. Code § 1775. In addition, employers may be

criminally liable for violating the "designated rules and regulations relating to minimum wages." *People v. Miles & Sons Trucking Service, Inc.*, 65 Cal. Rptr. 465, 470 (Cal. 1968), Cal. Lab. Code § 1777.

Van Elk submits that these civil and criminal penalties are the essential link between *Hoffman* and the present case. The California Court of Appeal ignored this linkage and therefore a large part of this Court's analysis in *Hoffman* relating to the deterrent effect that sanctions and penalties have on would-be violators of the labor laws. This overly simplistic analysis failed to recognize that "[p]revailing wage regulations are substantially different from minimum wage statutes." *San Francisco Labor Council v. Regents of University of California*, 163 Cal. Rptr. 460, 462 (Cal. 1980). Specifically, the California Labor Code's independent enforcement mechanism penalizes employers who violate the prevailing wage law and sets it apart from minimum wage law. An employer who violates the prevailing wage law will not "get off scot-free" if an illegal immigrant cannot bring a lawsuit. *Hoffman*, 535 U.S. at 152. The employer will still be subject to civil liability under Labor Code § 1775, and criminal liability under Labor Code § 1777. In *Hoffman,* this Court held that "traditional remedies. . . . provid[ed] a significant deterrent against future violations" even absent the remedy of a court-ordered award of backpay. *Hoffman*, 535 U.S. at 152.

Even if illegal aliens cannot recover prevailing wages, the law provides a robust deterrent for

would-be violators of the prevailing wage law in the form of civil and criminal penalties. Cal. Lab. Code §§ 1775, 1777. Respondents' prevailing wage claims should be examined according to *Hoffman* because the law and the facts of *Hoffman* closely resemble the circumstances of this case. Therefore, Van Elk submits that this Court should grant this petition to determine whether Respondents' claims for unpaid prevailing wages are foreclosed by *Hoffman* or whether *Hoffman* should be extended to achieve that result.

II. Federal Immigration Law Preempts California's Post-*Hoffman* Statutes.

The Supremacy Clause of the U.S. Constitution provides that federal law is supreme and state legislation that "conflicts with federal law is without effect" pursuant to the Supremacy Clause. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal citation omitted). Federal immigration law regulates immigration by controlling the admission and departure of immigrants in the U.S. and criminalizing the employment of illegal immigrants. *See generally* 8 U.S.C. § 1101 *et seq*. Here, California law provides that immigration status is "irrelevant" to a claim for prevailing wages. Cal. Lab. Code § 1171.5. But, in fact, a prevailing wage claim *depends* on immigration status pursuant to this Court's decision in *Hoffman*, 535 U.S. at 151-52, and therefore California law must yield to federal immigration law and this Court's precedent in *Hoffman*.

To demonstrate preemption, one of the following three indices must be shown. First, a federal law preempts a state law if Congress expressly states its intent to do so. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987). Second, preemption may be inferred if the breadth of federal regulation permits a "reasonable inference that Congress 'left no room' for supplementary state regulation." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And third, assuming Congress has left room for regulation, federal law will preempt state law if the two conflict. *Id.* A conflict occurs when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or if the state law interferes with the "accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This final element of preemption jurisprudence – conflict preemption – is the focus of this Petition. When addressing preemption claims, "the question whether a certain state action is preempted by federal law is one of congressional intent." *Ingersoll-Rand Co. v. McClendon*, 489 U.S. 133, 137-138 (1990). Here, it is difficult to perceive how California's post-*Hoffman* statutes can be consistent with Congress's intent to end the payment of wages to unauthorized workers when these statutes deem a worker's immigration status "irrelevant". Cal. Lab. Code § 1171.5. In fact, it strains the imagination to think that

Congress wished to allow California to set its own criteria for determining when a worker's immigration status is "relevant."

Accordingly, California's post-*Hoffman* statutes conflict with this Court's holding in *Hoffman* because immigration status is relevant, if not solely relevant, to claims for unpaid prevailing wages. 535 U.S. at 151-52. California's post-*Hoffman* statutes forbid any inquiry "into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law." Cal. Lab. Code § 1171.5. Yet, immigration status cannot be ignored because, under *Hoffman*, Congress has determined that a worker's eligibility to collect prevailing wages *depends upon* that worker's immigration status. As a consequence, an individual may maintain a suit to collect prevailing wages only if he is a legal worker. And therefore, it is relevant and necessary to ask whether a plaintiff is legally authorized to work in the United States.

Ultimately, the issue is not whether federal immigration law requires an inquiry into immigration status, as California's post-*Hoffman* statutes suggest. Rather, it is whether federal immigration law allows the payment of prevailing wages to unauthorized workers. Congress answered "no" to this question in the IRCA, 8 U.S.C. § 1101 *et seq.*, and this Court reiterated this prohibition in *Hoffman*, 535 U.S. at 151-52. By barring discovery into the immigration status of a worker and deeming immigration

status irrelevant, section 1171.5 directly impedes Congress's mandate. Simultaneous compliance with *Hoffman* and section 1171.5 is physically impossible and thus, under the Supremacy Clause, California's post-*Hoffman* statutes are preempted. *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43.

As this Court recognized in *De Canas v. Bica*, 424 U.S. 351 (1976), the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. However, the California Legislature's actions here are well beyond the state's authority. The post-*Hoffman* statutes enable illegal aliens to avoid federal authorities, perpetuate violations of the IRCA, and generally confound federal immigration law. The California Legislature sought to "keep our state's labor . . . remedies intact, and enhance compliance." Senate Bill Analysis, California Senate Bill 1818, Senate Bill Analysis, at 4 (August 22, 2004). However, furthering the state's labor law interests by circumventing Supreme Court precedent is unlawful and preempted by federal law.

CONCLUSION

For the reasons set forth above, this Court should grant this Petition to determine whether this Court's holding in *Hoffman* applies to prevailing wages and whether California's post-*Hoffman* statutes are contrary to the preemption doctrine.

Respectfully submitted,

WILLIAM PERRY PENDLEY, ESQ.*
**Counsel of Record*
ELIZABETH GALLAWAY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

ANDREW C. MUZI
DANA L. HARRIS
MUZI & ASSOCIATES
1851 East First Street, Suite 1257
Santa Ana, California 92705
(949) 553-9277

Attorneys for Petitioners

Dated: October 22, 2007

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSE REYES, et al, Plaintiffs and Appellants, v. VAN ELK, LTD., et al, Defendants and Appellants.	B182068 (Los Angeles County Super. Ct. No. BC 302275) (Filed Mar. 14, 2007)

APPEAL from a judgment of the Superior Court of Los Angeles County William F. Fahey, Judge. Reversed with directions.

Herb Fox; Donahoo & Associates and Richard E. Donahoo for Plaintiffs and Appellants.

Cynthia L. Rice, Julie Montgomery, Amagda Perez and Jennifer Ambacher for California Rural Legal Assistance Foundation as Amicus Curiae on behalf of Plaintiffs and Appellants.

Karen C. Tumlin and Marielena Hincapie for National Immigration Law Center, Asian Pacific American Legal Center of Southern California, Bet Tzedek Legal Services, California Rural Legal Assistance, Inc., Legal Aid Foundation of Los Angeles and Legal Aid Society-Employment Law Center as Amicus Curiae on behalf of Plaintiffs and Appellants.

Muzi & Associates, Andrew C. Muzi and Dana L. Harris for Defendants and Appellants.

Plaintiffs Jose Reyes, Francisco Reyes, Jose Perez and Carlos Flores were employed by defendant Van Elk, Ltd. ("Van Elk") on allegedly public works projects which were subject to California's prevailing wage law. (Lab. Code, §§[1] 1720-1861.) Plaintiffs sued Van Elk and others for failing to pay prevailing wages. The superior court granted summary judgment in favor of defendants on the grounds undocumented workers were precluded by the federal Immigration Reform and Control Act of 1986 ("the IRCA") (8 U.S.C. § 1101 et seq.) and *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137 from asserting such claims. The superior court also found the Supremacy Clause preempted California statutes declaring immigration status irrelevant to claims under California's labor, employment, civil rights and employee housing laws. Plaintiffs contend the IRCA and *Hoffman* do not preclude undocumented workers from asserting such claims and the California statutes are not preempted. Defendants contend the court erroneously denied their request for attorney's fees. We reverse the judgment and order the superior court to enter an order denying the motion for summary judgment.

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[1] Unless otherwise noted, all statutory references are to the Labor Code.

FACTUAL AND PROCEDURAL SYNOPSIS

Plaintiffs performed welding-related work for Van Elk on different construction projects in Los Angeles County. The causes of action alleged in the complaint include failing to pay prevailing wages,[2] breach of contract, recovery under public works payment bond, and unfair business practices. Plaintiffs later added as Doe defendants Fidelity and Deposit Company of Maryland ("Fidelity"), Fassberg Construction Company ("Fassberg") and Morillo Construction, Inc. ("Morillo"). Val Elk was a subcontractor for Fassberg and Morillo on the subject projects. Fidelity provided the payment bonds for the subject projects.

Defendant Van Elk filed a motion for summary judgment/summary adjudication arguing that pursuant to the IRCA and *Hoffman*, plaintiffs did not have standing to sue because they were undocumented workers.[3] In support of the "undisputed fact" plaintiffs were undocumented, defendants cited plaintiffs' discovery responses affirming they were not born in the United States and had no social security numbers

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[2] Plaintiffs were paid wages, but not prevailing wages.

[3] At oral argument, the parties stated all defendants were before the court on the summary judgment motion. However, judgment was only entered in favor of three of the four defendants – Van Elk, Fidelity and Fassberg. Morillo was not named in the judgment. Accordingly, the issue of whether the general contractors should be dismissed may be raised in the superior court.

and plaintiffs' refusals to respond to discovery questions regarding citizenship, legal residency status, documented worker status, and work visa information.

Alternatively, defendants sought summary adjudication of their claim that several of the construction projects identified in the complaint were not public works projects. Defendants also sought summary adjudication that the time plaintiffs spent "off-site" fabricating components to be installed at the construction projects was not governed by prevailing wage rates.

In opposition, plaintiffs invoked their statutory privilege to refuse to answer discovery question regarding their immigration status. (*See* Lab. Code, § 1171.5; Civ. Code, § 3339; Gov. Code, § 7285.)

The court granted summary judgment against Jose Reyes and Carlos Flores in part finding their discovery responses constituted admissions they were not authorized to obtain employment in the United States. Plaintiffs objected to the court's proposed order.

After a hearing, the court filed a revised order granting summary judgment against all four plaintiffs, finding (1) under *Hoffman*, plaintiffs had no standing to assert their action, (2) the three statutes making immigration status irrelevant to certain claims were preempted by the Supremacy Clause of the United States Constitution, and (3) there was no disputed fact plaintiffs were undocumented as the

evidence established each plaintiff had not been born in the United States and had no social security number, which shifted the burden to plaintiffs to introduce other evidence of authorization to work in the United States, and no such evidence had been adduced. The court denied summary adjudication on the basis it could not resolve discrete facts within a cause of action.

Plaintiffs filed a timely notice of appeal from the judgment entered after the court granted summary judgment. Defendants filed a timely notice of appeal from the order denying their request for attorney's fees.

DISCUSSION

I. Introduction

Defendants contend summary judgment was proper because they met their initial burden of showing all plaintiffs were undocumented. "On the grant of summary judgment, the appropriate standard of review is de novo." (*Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 733.)

Defendants argue plaintiffs did not have standing to bring their action as they were not in compliance with federal law, i.e., the IRCA. Thus, one issue presented by this appeal is whether an employee's undocumented status alone means he or she has no standing to bring an action for the payment of prevailing wages.

II. ICRA [sic]

The United States Supreme Court stated "[w]e have often recognized that a 'primary purpose in restricting immigration is to preserve jobs for American workers.'" (*INS v. National Center for Immigrants' Rights, Inc.* (1991) 502 U.S. 183, 194.)

The IRCA "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" (*Hoffman Plastic Compounds, Inc. v. NLRB, supra*, 535 U.S. at p. 147.) Among other things, the IRCA established an extensive "employment verification system" designed to deny employment to aliens who (a) are not legally present in the United States or (b) are not lawfully authorized to work in the United States. (8 U.S.C. §§ 1324a(a)(1) and 1324a(h)(3).) It is a crime for an unauthorized alien to subvert the employer verification system by tendering false documents. (8 U.S.C. § 1324c(a).) Both employers and unauthorized aliens who violate the IRCA may be punished by civil fines and criminal prosecution. (*Hoffman, supra*, 535 U.S. at p. 148.)

"Under the IRCA, it is unlawful to hire or continue to employ an alien the employer knows to be an 'unauthorized alien,' defined as one who is not lawfully admitted for permanent residence, or authorized to be so employed by federal immigration and nationality law or by the United States Attorney General. (8 U.S.C. § 1324a(a)(1)-(2), (h)(1).) The statute provides for graduated civil penalties for violations, and criminal penalties for employers who are found to have

engaged in a pattern or practice of hiring unauthorized aliens in violation of the law. (8 U.S.C. § 1324a(e)(4)-(5), (f)(1).) It is also a crime to knowingly accept a false immigration document for purposes of satisfying the requirements of the statute. (8 U.S.C. § 1324c(a)(2); 18 U.S.C. § 1546(b).)" (*Farmers Brothers Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533, 538.)

Several times in defendants' brief, they claim plaintiffs provided false documents to obtain employment.[4] The only "facts" listed in defendants' statement of facts in their summary judgment motion are that each plaintiff was "an undocumented worker not legally authorized to work in the United States." There is no "fact" that plaintiffs provided false documents. The only cited evidentiary support for the claim false documents were provided is in a response to a request for admission by Jose Perez. When Perez was asked if he provided false employment information to Van Elk, he objected, but admitted he had. False employment information is a vague term and could mean any number of things, including false information about an applicant's employment history,

[4] The IRCA requires employers to verify that each new hire is authorized to work in the United States. The employee must present documents establishing his or her identity and employment authorization. (For list of acceptable documents see 8 U.S.C. § 1324a(b); 8 C.F.R. 274a.2(b)(v).)

and does not necessarily mean the applicant submitted false work authorization documents.[5]

Thus, as presented to this court, this case does not involve a situation where undocumented workers submitted false work authorization documents to a prospective employer. (*See e.g., Ulloa v. Al's All Tree Service, Inc.* (Dist.Ct. 2003) 768 N.Y.S.2d 556, 558 ["The Court also notes in passing that, if there had been proof in this case that the Plaintiff had obtained his employment by tendering false documents (activity that is explicitly unlawful under IRCA), *Hoffman* would require that the wage claim [for unpaid wages] be disallowed in its entirety."].) However, the issue of whether *Hoffman* requires that a wage claim be denied if an employee submitted false authorization documents is not before this court.

III. Prevailing Wage Law

"The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

"Section 1773 requires the public entity 'awarding any contract for public work, or otherwise undertaking

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[5] One amicus curiae claims its clients regularly report that they are given documents and false names by the employers who hire them as a condition of employment. There is some indication in the record that Van Elk did not ask for employment authorization documents from plaintiffs.

any public work,' to obtain from the Director [of the Department of Industrial Relations] the general prevailing rate for each craft, classification or type of worker needed to execute the contract. The public entity must specify those rates in its call for bids, in bid specifications, and in the contract or, alternatively, must specify in those documents that the prevailing wage rates are on file in its principal office. (§ 1773.2.) [¶] A contractor for a public works project that fails to pay the prevailing rate to its workers is liable for the deficiency and is subject to a statutory penalty. (§ 1775.)" (*Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at p. 986.)

The Legislature has declared that it is the public policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a).)

"It is well established that California's prevailing wage law is a minimum wage law." (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 778.) "The duty to pay prevailing wages is mandated by statute and is enforceable independent of an express contractual agreement. (§§ 1771, 1774-1775.) Thus, while the obligation to pay prevailing wages arises from an

employment relationship which gives rise to contractual obligations and claims, the duty to pay the prevailing wage is statutory. (§§ 1771, 1774.) [¶] For these reasons we conclude that, *because the prevailing wage law is a minimum wage law mandated by statute* and serves important public policy goals, section 1194 provides an employee with a private statutory right to recover unpaid prevailing wages from an employer who fails to pay that minimum wage."[6] (Citations omitted; emphasis added.) (*Id.*, at p. 779.)

"Earned but unpaid salary or wages are vested property rights." (*Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1080.) Noncitizens are guaranteed the same property rights as citizens. (Cal. Const, art. I, § 20.)

In determining that paying prevailing wages was a statutory obligation, one court noted: "The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This

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[6] Thus, defendants' contention that even if the IRCA and *Hoffman* do not apply, plaintiffs are not entitled to be paid the prevailing wage because such wages are a special remedy is without merit as paying prevailing wages is a statutory duty not a remedy. Even though in *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 790, the California Supreme Court noted "[p]revailing wage regulations are substantially different from minimum wage statutes," that statement was made in relation to prevailing wage requirements which were not applicable to the employer in that case. The prevailing wage law was applicable to defendants.

general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." (*Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at p. 987; *see also People v. Hwang* (1994) 25 Cal.App.4th 1168, 1177 ["Prevailing wage legislation is intended to prevent government contractors from using '"itinerant, cheap, bootleg labor."'"].)

IV. *Hoffman*

In *Hoffman*, the court concluded that allowing the National Labor Relations Board ("NLRB") "to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and, encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA [National Labor Relations Act], it is not so unbounded as to authorize this sort of an award." (*Hoffman Plastic*

Compounds, Inc. v. NLRB, supra, 535 U.S. at pp. 151-152.) The court noted that awarding backpay[7] ran counter to the policies underlying the IRCA because it was for "years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud." (*Id.*, at p. 149.) The court, however, noted the NLRB could impose other "significant sanctions" against an employer for its violation of the NLRA. (*Id.*, at p. 152.)

Hoffman concerned remedies available to undocumented workers under the NLRA and not their standing to file a claim before the NLRB. The Supreme Court reaffirmed the portion of its earlier holding in *Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883 that undocumented workers had standing to file claims under the NLRA and were considered "employees" under the NLRA. (*Hoffman Plastic Compounds, Inc. v. NLRB, supra*, 535 U.S. at pp. 149-150, fn. 4; *see also Martinez v. Mecca Farms, Inc., supra*, 213 F.R.D. at p. 604 [the court rejected a suggestion that *Hoffman* removed undocumented aliens' right to file charges with the NLRB, reasoning *Hoffman* "dealt with the remedies available to the undocumented, and not his right to file a charge with the NLRB."].)

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[7] "Back pay" "seeks to make an employee whole by awarding wages that would have been earned but for an unlawful firing." (*Martinez v. Mecca Farms, Inc.* (S.D.Fla.2002) 213 F.R.D. 601, 604.)

In *Patel v. Quality Inn South* (11th Cir. 1988) 846 F.2d 700, 704, the court held the IRCA did not purport to limit remedies (for unpaid wages) available to undocumented aliens under the Fair Labor Standards Act ("FLSA") reasoning that if the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. The court concluded the legislative history of the IRCA "strongly suggest[ed]" Congress believed undocumented workers would continue to be protected by state and federal wage laws. (*Ibid.*) The court also noted the appropriation of additional funds in the IRCA for the increased FLSA enforcement on behalf of undocumented workers supported that supposition. (*Ibid.*) The court reasoned that minimum wage laws supported the IRCA policy of reducing illegal immigration because such laws offset the most "attractive feature" of such workers – their willingness to work for less than the minimum wage. (*Ibid.*) The court opined claims for wages for work already performed did not conflict with federal immigration policy. (*Id.*, at pp. 705-706.) Other courts agree that the IRCA did not foreclose all remedies for undocumented workers under FLSA, NLRA or other federal labor statutes. (*See e.g.*, cases cited in *Patel, supra*, 846 F.2d at p. 703 & p. 703, fn. 4; *Mester Mfg. Co. v. I.N.S.* (9th Cir. 1989) 879 F.2d 561, 567; *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.* (N.D.Cal. 1998) 25 F.Supp.2d 1053, 1056.)

Defendants argue *Hoffman* would prohibit plaintiffs' action for unpaid prevailing wages because there is no basis to restrict its reasoning to back pay as the court would have said so if it wanted to do so. The

dissent in *Hoffman* noted the IRCA does not address the enforcement of other state laws. (*Hoffman Plastic Compounds, Inc. v. NLRB, supra*, 535 U.S. at pp. 154-155 (dis. opn. of Breyer, J.).)

Defendants cite three cases which they claim support their position. Two of those cases note that *Hoffman* did not preclude an undocumented worker's claim for wages for work already performed. (*Crespo v. Evergo Corp.* (N.J.Super.A.D. 2004) 841 A.2d 471, 475; *Ulloa v. Al's All Tree Service, Inc., supra*, 768 N.Y.S.2d at pp. 557-558.) In the third case, *Escobar v. Spartan Security Service* (S.D.Tex. 2003) 281 F.Supp.2d 895, 897, the court noted if *Hoffman* was viewed quite broadly, it would limit an undocumented worker's remedies under the Civil Rights Act, but stated the rationale for extending *Hoffman* to foreclose all the remedies claimed by the employee was not applicable because that employee had become documented. However, the court also noted that *Hoffman* "did not specifically foreclose all remedies for undocumented workers under either the [NLRA] or other comparable federal labor statutes." (*Ibid.*)

In *Zavala v. Wal-Mart Stores, Inc.* (D.N.J. 2005) 393 F.Supp.2d 295, 325 the court concluded the FLSA did not preclude undocumented workers from obtaining relief for work already performed. The court was persuaded *Hoffman* did not prohibit such relief because, in contrast to *Hoffman*, the plaintiffs in *Zavala* were seeking unpaid wages for work already

performed, the definition of "employee"[8] under the FLSA was broad and not limited to citizens, and post-*Hoffman* interpretations by the Department of Labor and post-*Hoffman* court decisions construed the FLSA to cover undocumented workers. (*Id.*, at pp. 322-325.) For much the same reasons, we are persuaded that *Hoffman* does not prohibit plaintiffs from having standing to raise claims for prevailing wages as those claims are also for work already performed.

V. Preemption

The superior court found that because there was no dispute plaintiffs were undocumented, the burden shifted to them to introduce evidence of their authorization to work in the United States. Plaintiffs argue that finding was improper under section 1171.5 and the other statutes declaring all residents of California are entitled to the protection of California's labor, employment, civil rights and employee housing laws regardless of immigration status.

Section 1171.5[9] reads, in relevant part:

> "(a) All protections, rights, and remedies available under state law, except any

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[8] The prevailing wage law uses the general term "worker" and does not restrict workers to citizens.

[9] Civil Code section 3339 and Government Code section 7285 contain similar language, but include civil rights and employee housing laws under the protection afforded by subdivision (b). The Legislature enacted those three statutes in response to *Hoffman*. (*Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1073.)

> reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.
>
> "(b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.
>
> "(c) The provisions of this section are declaratory of existing law."

Citing section 1171.5, one court observed, "Thus, if an employer hires an undocumented worker, the employer will also bear the burden of complying with this state's wage, hour and workers' compensation laws." (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460.)

"'Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, . . . state law that conflicts with federal law is "without effect." Consideration of issues arising under the Supremacy Clause "start[s] with

the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."'" [¶] Examples of historic police powers include '[c]hild labor laws, *minimum and other wage laws*, laws affecting occupational health and safety, and workmen's compensation laws. . . .' 'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.' 'Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis. [¶] Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'"'" (Citations omitted; emphasis added.) (*Farmers Brothers Coffee v. Workers' Comp. Appeals Bd., supra*, 133 Cal.App.4th at pp. 538-539; *see also Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.)

"Power to regulate immigration is unquestionably exclusively a federal power. But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised." (Citations and

emphasis deleted.) (*De Canas v. Bica* (1976) 424 U.S. 351, 354-355.)

Citing *Sanango v. 200 East 16th St. Housing Corp.* (A.D. 1 Dept. 2004) 788 N.Y.S.2d 314, defendants argue the post-*Hoffman* statutes are preempted by the IRCA. Based on *Hoffman*, the *Sanango* court determined that state tort law, to the extent it permitted recovery for lost wages, was preempted by the IRCA. (*Id.*, at pp. 316-317.) However, *Sanango* is inapposite as, like back pay, lost wages are for "wages that plaintiff allegedly would have been able to earn in the United States but for his injuries." (*Id.*, at p. 316.)

Because legislation providing for the payment of prevailing wages comes under the historic police powers of the state, the presumption is that legislation is not superseded by the IRCA. Defendants do not cite any provision in the IRCA preempting state wage and hour legislation. The only specific preemption provision prohibits state or local law from imposing civil or criminal sanctions upon those who employ unauthorized aliens. (8 U.S.C. § 1324a(h)(2).) That provision is irrelevant to the wage claims asserted by plaintiffs. Thus, the IRCA does not expressly preempt state wage laws.

In *Farmers Brothers*, the court determined California's Workers' Compensation Act did not conflict with the IRCA. (*Farmers Brothers Coffee v. Workers' Comp. Appeals Bd., supra*, 133 Cal.App.4th at pp. 539-542.) "As it stated in its report prior to the

passage of the IRCA, the House Judiciary Committee discerned no intention in the statute 'that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state . . . labor standards agencies. . . .' (H.R.Rep. No. 99-682(I), 2d Sess. (1986), reprinted in 1986 U.S.Code Cong. & Admin. News, p. 5662.)"[10] (Citation omitted.) (*Farmers Brothers Coffee v. Workers' Comp. Appeals Bd., supra*, 133 Cal.App.4th at p. 539.) Moreover, as the IRCA does not contain provisions relating to the payment of wages, minimum or otherwise, Congress did not implicitly preempt prevailing wage laws by occupying that field. (*Id.*, at p. 540; *see also Cipollone v. Liggett Group, Inc., supra,* 505 U.S. at p. 516.)

Defendants argue the post-*Hoffman* California statutes are in direct conflict with *Hoffman* as they prevent or frustrate the accomplishment of federal objectives. We conclude there is no actual conflict between the IRCA and the prevailing wage law as the state law is not an obstacle to the accomplishment and execution of the full purposes and objectives of the IRCA. (*Cf. Farmers Brothers Coffee v. Workers' Comp. Appeals Bd., supra*, 133 Cal.App.4th at p. 540; *see also Cipollone v. Liggett Group, Inc., supra*, 505 U.S. at p. 516.)

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[10] "Although a committee report is not dispositive of congressional intent, it may be helpful in discerning it." (Citation omitted.) (*Farmers Brothers Coffee v. Workers' Comp. Appeals Bd., supra,* 133 Cal.App.4th at p. 539, fn. 4.)

The ultimate goal of the IRCA is to control illegal immigration into the United States by prohibiting the employment of unauthorized aliens. (3A Am.Jur.2d (2005) Aliens and Citizens, § 25, p. 73; 8 U.S.C. § 1324a(a).) Allowing employers to hire undocumented workers and pay them less than the wage mandated by statute is a strong incentive for the employers to do so, which in turn encourages illegal immigration. The fact an employer pays a worker less than the prevailing wage suggests the employer knew the worker was undocumented. Moreover, it is not the public which benefits from the savings. Employers are awarded public works contracts based on bids; bids which provide for the payment of prevailing wages. When prevailing wages are not paid, it is the employer who pockets the difference just as if it had provided substandard materials to those promised in a contract. (*See People v. Hwang, supra*, 25 Cal.App.4th at p. 1177 ["If contractors . . . are permitted to win public works contracts based on their express written agreement to pay workers the prevailing wage, and if they then pay their workers far less than the prevailing wage, the entire statutory scheme [for prevailing wages] would be subverted."]; *see also Rivera v. NIBCO, Inc., supra*, 364 F.3d. at p. 1072 ["Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but

insist upon their enforcement when their employees complain."].)

In *Hoffman*, the undocumented worker obtained employment by using false authorization documents; the court determined the award of back pay violated the IRCA because it provided wages for work not performed and for work that could not have been performed without violating the IRCA. (*Hoffman Plastic Compounds, Inc. v. NLRB, supra*, 535 U.S. at pp. 141, 149-150.) In contrast to *Hoffman*, the work at issue in the case at bar had already been performed. The *Hoffman* court concluded, "recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts [the IRCA]." (*Id.*, at, p. 150.) Allowing employers to hire undocumented workers and pay them less than the prevailing wage would also subvert the IRCA by condoning and encouraging future violations by employers. Moreover, such awards do not condone future unauthorized work; rather they make it clear that employers should not be allowed to profit from employing undocumented workers and then exploiting them.

As one federal circuit court reasoned: "We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job – at any wage – that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the

FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA." (*Patel v. Quality Inn South, supra*, 846 F.2d at pp. 704-705; *Singh v. Jutla* (N.D.Cal. 2002) 214 F.Supp.2d 1056, 1062 [The FLSA "discourages employers from hiring such workers because it eliminates the employers' ability to pay them less than minimum wage or otherwise take advantage of their status."]; *Flores v. Amigon* (E.D.N.Y. 2002) 233 F.Supp.2d 462, 464 [If employers know they will not only be subject to civil and criminal penalties "when they hire illegal aliens, but they will also be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance."].) Hence, the IRCA does not preempt California's prevailing wage law as the prevailing wage law removes a major incentive to hiring undocumented workers.

In conclusion, we hold that *Hoffman* and their undocumented status did not prohibit plaintiffs from having standing to raise their prevailing wage claim and that the prevailing wage law and the post-*Hoffman* statutes are not preempted by the IRAC [sic]. Accordingly, we reverse the judgment and the order granting summary judgment and direct the superior court to enter an order denying the motion for summary judgment. We need not consider the cross-appeal from the order denying defendants' request for attorney's fees.

DISPOSITION

The judgment is reversed with directions to enter an order denying the motion for summary judgment. Plaintiffs to recover costs on appeal.

CERTIFIED FOR PUBLICATION

WOODS, J.

We concur:

PERLUSS, P.J. **JOHNSON, J.**

Dana L. Harris
Muzi & Associates
1851 East First Street
Suite 1257
Santa Ana, CA 92705

Division 7
Jose Reyes et al.
v.
Van Elk, Ltd. et al.
B182068

REYES V. VAN ELK
BC 302275
November 16, 2004

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION

Plaintiffs are former construction worker employees of defendant Van Elk, Ltd. They allege that they worked on numerous public construction projects within Los Angeles County and that defendant failed to pay them the prevailing hourly wage rates. They also allege that defendant did not pay overtime nor provide health and vacation benefits. Van Elk now moves for summary judgement on the basis that plaintiffs are "undocumented workers" and therefore, have no standing to bring this action. Alternative, Van Elk seeks summary adjudication on five of the eight projects at issue, alleging that these projects are not "public works" projects as to which the prevailing wage laws apply. The Court has fully considered the papers submitted by the parties and the oral argument of counsel, and hereby rules as follows.

In support of its summary judgment motion, defendant relies on the recent Supreme Court case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002). There, Justice Rehnquist, writing for the Court, held that "award[ing] backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by

immigration authorities, condone prior violations of the immigration laws, and encourage future violations." 535 U.S. at 283-84. Elsewhere in the opinion, the Supreme Court held that "for an alien to be 'authorized' to work in the United States, he or she must possess 'a valid social security account number card' [citation omitted] or 'other documentation evidencing authorization of employment in the United States.'" *Id.* at 281, n. 3.

In opposition, plaintiffs rely on various provisions of the California Labor Code, Civil Code and Government Code. However, these laws cannot and do not take precedence over a federal statute, interpreted by the United States Supreme Court. *See U.S. Constitution,* Art. VI, Sec. 2 ("Supremacy Clause"). Plaintiffs' additional citation to the case of *Hernandez v. Paicius,* 109 Cal. App. 4th 452 (2003), is not apt. First, the facts in *Hernandez* are far different than those in the instant case. There, both trial court and defendant's trial counsel made remarks which the appellate court deemed were prejudicial to plaintiff's ability to receive a fair trial. Moreover, the *Hernandez* court failed to cite, let alone distinguish, *Hoffman Plastics* in reaching its decision.

This Court is further guided by a recent Second District, unpublished opinion which also dealt with the granting of a summary judgment motion brought by a company which was sued by an undocumented alien. *See Morejon v. Terry Hinge and Hardware*, 2003 Cal. App. Unpub. Lexis 10394 (November 4, 2003). In affirming the granting of summary judgment, the

appellate court cited the *Hoffman Plastics* case as part of its analysis, holding that a [sic] undocumented alien may not recover for wrongful termination. To rule otherwise would be in contravention of public policy.

In this case, defendant claims that it is undisputed that all four plaintiffs are undocumented. Defendant's proof starts with the admissions of plaintiffs Jose Reyes and Francisco Reyes that they were not born in the United States. However, contrary to defendant's Separate Statement of Undisputed Facts, there was no such admission by plaintiffs Jose Perez and Carlos Flores. *Compare* Answers to Request for Admission No. 13 for Jose Reyes and Francisco Reyes *with* Answer to Request for Admission 16 for Jose Perez and Answer to Request for Admission 14 for Carlos Flores.

Defendant provides further evidence of Jose Reyes' status. In his deposition, Jose Reyes admits he never has had a Social Security number. Defendant's Separate Statement claims that Francisco Reyes made the same admission in his deposition at page 57, but defendant failed to provide that page of the deposition in its exhibits. Similarly, defendant failed to provide page 28 of the deposition of Jose Perez wherein Mr. Perez supposedly admitted that he never had a Social Security card. On the other hand, defendant did attach the page of Carlos Flores' deposition in which he admitted that he does not have a Social Security number.

Based upon this evidence, and the holding of *Hoffman Plastics*, the burden has shifted to plaintiffs Jose Reyes and Carlos Flores only to introduce admissible that they have "other documentation evidencing authorization of employment in the United States." The burden has not shifted as to plaintiffs Francisco Reyes and Jose Perez. This Court finds that a mere admission of an employee that he was born outside the United States is insufficient to meet the *Hoffman Plastics* test.

Plaintiffs Jose Reyes and Carlos Flores have failed to introduce competent evidence that they are authorized to obtain employment in the United States. Instead, their Separate Statement merely objects to defendant's evidence. The Motion for Summary Judgment is GRANTED as to Jose Reyes and Carlos Flores, there being no disputed fact as to their employment status. The Motion for Summary Judgment is DENIED as to Francisco Reyes and Jose Perez.

The Motion for Summary Adjudication is also DENIED. The motion is not well-taken as to defendant's attempt to reduce plaintiffs' claim for damages on five of the eight projects at issue. The law does not favor piecemeal adjudication of facts asserted in a particular cause of action. *See, e.g., Catalano v. Superior Court*, 82 Cal. App. 4th 91, 92 (2000). Nor is the motion well-taken as to the argument that the remaining plaintiffs are not entitled to recover prevailing wages for "off-site" work performed.

In ruling on the Motion for Summary Adjudication, this Court strikes the entire Declaration of Emil Vassilev, who asserted his Fifth Amendment privilege during his deposition. He cannot now file a self-serving declaration. *See Alvarez v. Sanchez*, 158 Cal. App. 3d 709, 712-13 (1984). The objections to the Declarations of Richard Dennis, John O'Neal, Dora Leong Gallo, Arthur Otero, Paul Lasiter, and Jerry Givens are overruled. Plaintiffs' objections to defendant's exhibits E and F are sustained; the documents are not properly authenticated.

Defendant is to prepare an [sic] Proposed Order in conformance with this Order and is to give notice to plaintiffs.

IT IS SO ORDERED.

Court of Appeal, Second Appellate
District, Div. 7-n No. B182068
S152133

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOSE REYES et al., Plaintiffs and Appellants,

v.

VAN ELK, LTD, et al., Defendants and Appellants

(Filed Jun. 13, 2007)

The petition for review is denied.

GEORGE
Chief Justice

Supreme Court, U.S.
FILED
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2

No. 07-545

In The Supreme Court of the United States

VAN ELK, LTD., and
MORILLO CONSTRUCTION, INC.,

Petitioners,

v.

JOSE REYES, FRANCISCO REYES,
JOSE PEREZ, and CARLOS FLORES,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD DONAHOO
(Counsel of Record)
DONAHOO & ASSOCIATES
505 N. Tustin Ave., Suite 160
Santa Ana, CA 92705
(714) 953-1010

HERB FOX
LAW OFFICE OF HERB FOX
15 W. Carrillo St., Suite 211
Santa Barbara, CA 93101
(805) 899-4777

LINTON JOAQUIN
MARIELENA HINCAPIÉ
KAREN C. TUMLIN
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
(213) 639-3900

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court should review the California District Court of Appeal's decision that the California statute allowing undocumented workers to recover unpaid prevailing wages for work already performed is not preempted by federal immigration law, where the appellate court conscientiously and correctly applied the preemption tests established by this Court's precedents and where that decision is consistent with the rulings of all other courts to consider similar questions.

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REASONS FOR DENYING THE PETITION

Respondents request that the Court deny the petition and leave in place the decision of the California Appellate Court. The decision below should be left undisturbed because the California statute providing that all employees, regardless of immigration status, may recover unpaid prevailing wages for work already performed is lawful and should be effectuated. It is well settled that federal immigration law does not preempt state remedies to ensure that all workers can recover unpaid prevailing wages or other statutory minimum wages for work already performed and there is no conflict between decisions of other circuits or the state courts of last resort on this issue.

I. The Appellate Court's Decision that Respondents' Claims are Not Preempted Is Not in Conflict with Other Courts

Petitioners do not argue that the appellate court's decision is contrary to decisions of other state or federal courts that have considered the issue – nor could they. Petitioners cannot point to a single case that finds claims for prevailing wages – or other statutory minimum wages – for work already performed are preempted by federal immigration law. Instead, the clear consensus among state and federal courts that have considered the issue is that such claims are not preempted. As such, this issue is not

ripe for Supreme Court consideration. *See* Sup. Ct. R. 10.

At least one other state court has determined that undocumented immigrants' claims for unpaid prevailing wages are not federally preempted. *Pineda v. Kel-Tech Const., Inc.*, 832 N.Y.S.2d 386, 392-93 (N.Y. Sup. Ct. 2007). In addition, federal case law both before and after this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) makes clear that courts may award unpaid wages to undocumented workers for work already performed under the Fair Labor Standards Act (FLSA). *See* 29 U.S.C. § 201 et seq. Following the 1986 enactment of the federal Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, but prior to this Court's *Hoffman* decision, federal circuit courts uniformly held that IRCA's passage did not bar undocumented workers from seeking remedies under the FLSA, including claims for unpaid wages. *See Patel v. Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988), *cert. denied*, 489 U.S. 1101 (1989) (holding that undocumented immigrants are entitled to the FLSA's protections against minimum wage and overtime violations); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988) ("[I]t is well established that the protections of the [FLSA] are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."); *see also Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989) (noting that the IRCA did not repeal the FLSA's coverage of

undocumented workers) (citation omitted); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) ("There is no question that the protections provided by the FLSA apply to undocumented aliens."). In so holding, these courts stressed that allowing undocumented workers to recover wages for work performed, but not paid, furthers the IRCA's federal policy goals of reducing unauthorized work. *See, e.g., Patel,* 846 F.2d at 704 ("If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them."). This Court's decision in *Hoffman* does nothing to alter this line of cases.

Since *Hoffman*, numerous federal courts have considered whether immigration status is relevant to claims for unpaid wages under the FLSA. These federal cases are analogous to the case before the Court for several reasons. First, California wage and hour law provides at least equivalent protection to workers as the FLSA. *See, e.g., Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 592 (2002) (noting the "recognized principle" that state wage and hour law may provide greater protection than the FLSA); *see also* 29 U.S.C. § 218(a) (allowing states and municipalities to enact more generous minimum wage laws than provided under the FLSA). Second, for construction workers on public projects costing over $1,000 California's prevailing wage law is the relevant state minimum wage. *See* Cal. Labor Code § 1771. There is no conceptual distinction between workers' claims for unpaid minimum wages under the FLSA and the

plaintiffs' claims here for unpaid prevailing wages under the California statute that is the minimum wage for the construction work they performed.

Every federal court that has considered the issue has held that *Hoffman* does not bar payment of unpaid wages to undocumented workers for work already performed under the FLSA and relevant state laws. *See, e.g., Chellen v. John Pickle Co., Inc.*, 434 F. Supp. 2d 1069, 1098 (N.D. Okla. 2006); *Flores v. Limehouse*, No. 2:04-1295-CWH, 2006 WL 1328762, at *2 (D. S.C. May 11, 2006); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501 (W.D. Mich. 2005); *Singh v. Jutla, et al.*, 214 F. Supp. 2d 1056, 1060 (N.D. Cal. 2002); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 322 (D. N.J. 2005); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *Cortez v. Medina's Landscaping*, No. 00-C6320, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002); *Flores v. Albertsons, Inc.*, No. CV0100515AHM (SHx), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 2, 2002); *see also Cabrera v. Ekema*, 265 Mich. App. 402, 408-11 (Mich. Ct. App. 2005). Each of these cases emphasizes that *Hoffman* held that undocumented workers were not entitled to *post-termination* backpay under the National Labor Relations Act (NLRA) because awarding such a remedy is premised on the workers' eligibility to work in the future, which requires a court to put a stamp of approval on continued unauthorized work. *See Hoffman*, 535 U.S. at 149-50; *see also* NLRA, 29 U.S.C.

§ 151 et seq. In contrast, there is no such inherent conflict in the award of damages for work already performed.

The FLSA sets the federal minimum wage and allows states to create more protective wage and hour laws. California has done so. In California, construction workers on public projects costing over $1,000 are entitled to pay at the prevailing wage rate. Cal. Lab. Code §§ 1720, 1770, 1771. Under California labor and employment laws, as under the FLSA, undocumented workers are covered employees and their immigration status is irrelevant to the issue of an employer's liability. Cal. Lab. Code § 1171.5(b). Under state law, immigration status is only relevant if undocumented workers seek a reinstatement remedy, which is prohibited by federal law. Cal. Lab. Code § 1171.5(a). But, plaintiffs here do not seek reinstatement; they simply seek payment for prior work they have already performed. There is, therefore, no reason to treat an undocumented worker's claim for unpaid wages under California's prevailing wage law any differently than an undocumented worker's claim to collect unpaid wages under the FLSA.

Reversing the appellate court's decision would not only frustrate federal immigration law, but would also undermine state employment law and the labor rights of all workers – immigrants and native-born alike. The federal immigration policy concerns central to the *Hoffman* decision are not implicated by this appeal. In *Hoffman*, this Court held that the National

Labor Relations Board (NLRB) was prohibited from awarding backpay to undocumented immigrants because such an award "runs counter to policies underlying IRCA." *Hoffman,* 535 U.S. at 149. However, an entirely different set of equities must be considered in cases like the instant appeal where undocumented workers seek unpaid wages for work already performed. In such cases there is no threat that awarding damages would conflict with federal immigration policy by condoning future unauthorized work. Instead, such awards simply make clear that employers should not be allowed to profit from employing undocumented workers and then exploiting them in order to get free labor. For this reason, this case has ramifications far beyond the four plaintiffs' claims. If undocumented workers could not sue to enforce their statutory rights to pay for work performed, employers would actually have an incentive to hire such laborers, which would undermine federal immigration policy as articulated by the IRCA. *See Patel,* 846 F.2d at 704 ("If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them."); *Singh*, 214 F. Supp. 2d at 1061-62 (N.D. Cal. 2002) (noting that the FLSA "discourages employers from hiring [unauthorized] workers because it eliminates employers' ability to pay them less than minimum wage or otherwise take advantage of their status").

In addition, allowing employers to avoid liability for prevailing wages for work performed undermines labor and employment law and creates "a perverse incentive [for employers] to ignore immigration laws

at the time of hiring but insist upon their enforcement when their employees complain." *Rivera, et al. v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005) As courts have noted, some unscrupulous employers seek out undocumented workers in order to gain economic advantage by employing cheap labor and reducing the likelihood that workers will report them for violations of statutory rights. *See id.*; *Flores v. Amigon,* 233 F. Supp. 2d at 464. There can be no doubt that requiring employers to pay undocumented workers at the same rate as documented workers furthers, rather than frustrates, federal immigration policy as well as labor and employment law. *See also Singh,* 214 F. Supp. 2d at 1062; *Flores v. Amigon*, 233 F. Supp. 2d at 464; *Patel*, 846 F.2d at 704.

II. The Appellate Court Correctly Applied this Court's Precedents on Preemption to Respondents' Claims for Unpaid, Prevailing Wages

A. This Court's Decision in *Hoffman* Does not Preclude Undocumented Workers from Recovering Prevailing Wages for Work Already Performed

The linchpin of the petition is the assertion that the "legal anatomy" of a prevailing wage claim for work already performed so closely resembles a claim for backpay for work *not performed* under the NLRA that this Court's ruling in *Hoffman* must preclude recovery. This is incorrect and would constitute a

sweeping expansion of the Court's *Hoffman* decision. First, the *Hoffman* decision explicitly reaffirms the portion of the Court's earlier decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 833, 892 (1984) holding that undocumented immigrants continue to be covered by the "employee" definition under the NLRA and therefore have standing to enforce violations of the Act.

This Court's decision in *Hoffman* only precluded undocumented workers from recovering a single remedy, post-termination backpay, under a single federal statute, the NLRA. Post-termination backpay is compensation for the wages a worker would have earned in the future but for the employer's illegal firing. In reaching its decision in *Hoffman* this Court noted that such backpay awards inherently require the NLRB to approve of future unauthorized work despite the restrictions on such employment in the IRCA. Nothing in *Hoffman* limits courts' ability to award unpaid prevailing wages to undocumented workers for work already performed, which unlike the award of post-termination backpay, does not require courts to put a stamp of approval on future, unauthorized work, but instead keeps employers from unjustly benefiting from the work already carried out by its employees.

In addition, this Court's decision in *Hoffman* turned, to a great extent, on the nature and purposes of the NLRA as well as the NLRB's limited ability to order remedies for violations of the Act. Thus, the decision is inherently limited to the NLRA. Nonetheless, in *Hoffman* this Court made clear that other

remedies remained available to undocumented workers whose NLRA rights were violated. *Hoffman*, 535 U.S. at 152 (finding that the NLRB was free to impose other sanctions for the employer's violation of the NLRA). Finally, this case is not the proper vehicle to consider whether the Court's *Hoffman* decision should be extended to bar other federal or state remedies that may require courts to deny a remedy because it is akin to backpay under the NLRA or because such remedies frustrate the objectives of federal immigration law. This case simply does not present those questions.

Petitioners try unsuccessfully to distinguish California's prevailing wage statute from other statutory minimum wage laws in order to avoid the strong weight of authority – both before and after *Hoffman* – establishing that undocumented workers are entitled to recover wages for work already performed. This argument is without merit – California's prevailing wage law is, in all respects, a minimum wage law. *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765, 770 (2004) (concluding that the California "prevailing wage is a minimum wage"). Petitioners claim that the mere fact that California's prevailing wage law may be enforced administratively provides "the essential link" between this Court's *Hoffman* decision and the instant case because administrative enforcement provides a deterrent for employers who violate the state's prevailing wage law. Pet. 14. Therefore, according to petitioners, denying the remedy of recovery

of unpaid prevailing wages for work already performed is no different than denying the remedy of post-termination backpay under the NLRA. *Id.* at 14-15. As an initial matter, petitioners misconstrue the Court's rationale for denying post-termination backpay to undocumented workers while leaving intact other NLRA remedies – namely that awarding backpay condones future unauthorized work.

In addition, petitioners' statements about the administrative enforcement of California's prevailing wage law are misleading or inaccurate in several respects. First, petitioners incorrectly indicate that the administrative enforcement of California's prevailing wage law sets it apart from the state minimum wage law. On the contrary, an administrative enforcement scheme also exists for state minimum wage law violations. Second, petitioners ignore the strong evidence that the administrative enforcement regime for prevailing wages is insufficient to deter employer violations. To remedy the inadequacy of administrative enforcement, the California Legislature enacted the Labor Code Private Attorney General Act of 2004 to allow aggrieved employees to act as private attorneys general and to seek civil penalties for labor code violations, including prevailing wage violations, which previously could only be assessed by state agencies. Cal. Labor Code § 2698 et seq.; § 2699.5 (including a private right of action to enforce California's prevailing wage law under the Private Attorney General Act). In passing the Act, the Legislature made the following findings:

(a) Adequate financing of essential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws in the underground economy and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practices.

(b) Although innovative labor law education programs and self-policing efforts by industry watchdog groups may have some success in educating some employers about their obligations under state labor laws, in other cases the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor Code.

(c) *Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future.*

(d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general*, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.

2003 Cal. Stat. ch. 906, § 1 (emphasis added). For each of these reasons, petitioners' attempt to distinguish

prevailing wages from other statutory minimum wages is unconvincing, and therefore, petitioner's assertion that the "legal anatomy" of respondents' claims for unpaid prevailing wages is analogous to that of the post-termination backpay at issue in *Hoffman* also fails.

B. California Labor Code § 1171.5 is not Conflict Preempted by Federal Immigration Law

Federal immigration law does not preempt California Labor Code § 1171.5, which provides that workers are entitled to full protection of the state labor law for the purposes of enforcing labor standards, including collecting unpaid wages for work already performed, regardless of immigration status. This provision of the California Labor Code was enacted as a part of a state statute passed following the Court's *Hoffman* decision and was designed to clarify that *Hoffman* did not alter existing state laws providing remedies to all employees, regardless of immigration status. Despite the fact that it is "never assumed lightly that Congress has derogated state regulation," *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995), the petitioners ask this Court to find that California's prevailing wage statute violates the Supremacy clause and is federally preempted. Pet. 9; *see* U.S. Const., art. VI, § 2, cl. 2. The presumption against federal preemption is especially strong when the state statute at issue falls within the

state's historic police powers. *See De Canas v. Bica*, 424 U.S. 351, 356-57 (1976) (refusing to presume that Congress intended to oust state's broad authority to regulate the employment relationship). Like workers' compensation, minimum wage and other labor laws, such as prevailing wages, fall within the state's historic police powers. *See Farmer Bros. Coffee v. Workers' Compensation Appeals Board*, 133 Cal. App. 4th 533, 538-39 (quoting *De Canas*, 424 U.S. at 356-57) (2005). In such a case, state law cannot be pre-empted by a federal act unless such intent is express in the federal act in question, or reasonably inferred from the existence of an actual conflict between the state and federal laws or the federal law's thorough occupation of the legislative field. *Id.* at 539.

The Supremacy Clause "may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law." *New York State Conf. of Blue Cross & Blue Shield Plans*, 514 U.S. at 654. The petitioners only assert that California's Labor Code is conflict preempted. But there is nothing in the IRCA indicating a congressional intent to preempt by implication state regulation of state wage and hour law, including prevailing wages, or the damages that may be recovered in a civil action under similar state or federal minimum wage laws.[1] To the contrary, in the IRCA Congress

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[1] Petitioners make no argument that the IRCA expressly preempts state wage and hour law, such as California's prevailing wage statute, nor could they. The only express preemption

(Continued on following page)

authorized funds to bolster the ability for undocumented immigrants to enforce federal minimum wage law under the FLSA.[2] *Patel*, 846 F.2d at 704 (noting that these additional funds were necessary "in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens"). In addition, IRCA's legislative history shows that the Act was not "to undermine or diminish in any way labor protections in existing law." H.R. Rep. No. 99-682, *reprinted in* 1986 U.S.C.C.A.N. 5662. For these reasons, it cannot be argued that California prevailing wage law is implicitly preempted by a federal desire to occupy the field of wage and hour law. Furthermore, allowing undocumented workers to recover the statutorily required prevailing wages for work already performed does not conflict with or erode the IRCA's objectives in a manner sufficient to override the strong presumption against preemption. Instead, as discussed, enforcing prevailing wage law actually fosters the

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provision in the IRCA is the prohibition on state and local employer sanction laws that impose criminal and civil sanctions for employers who knowingly hire unauthorized workers. 8 U.S.C. § 1324a(h)(2).

[2] Section 111(d) of the IRCA states in pertinent part, "[t]here are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens. Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986).

IRCA's objectives by eliminating an incentive for unscrupulous employers to hire undocumented workers. Petitioners provide no authority for the proposition that California Labor Code § 1171.5 is conflict preempted. Instead, they simply assert that "Congress has determined that a worker's eligibility to collect prevailing wages *depends upon* that worker's immigration status." Pet. 17. But, the petition fails to point out any Congressional statute, act, or even report standing for this proposition. For these reasons, the appellate court below correctly concluded that neither *Hoffman* nor the IRCA preempts California Labor Code § 1171.5 for the purpose of allowing all workers, irrespective of their immigration status, to recover prevailing wages for work already performed.

CONCLUSION

Because this case is narrowly tied to its particular facts and presents no issue warranting review by this Court, the petition for writ of certiorari should be denied.

Dated: December, 2007

Respectfully submitted,

LINTON JOAQUIN
MARIELENA HINCAPIÉ
KAREN C. TUMLIN
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
(213) 639-3900

RICHARD DONAHOO
(Counsel of Record)
DONAHOO & ASSOCIATES
505 N. Tustin Ave., Suite 160
Santa Ana, CA 92705
(714) 953-1010

HERB FOX
LAW OFFICE OF HERB FOX
15 W. Carrillo St., Suite 211
Santa Barbara, CA 93101
(805) 899-4777

On behalf of Attorneys for Respondents Jose Reyes, et al.

(3)

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VAN ELK, LTD. AND MORILLO CONSTRUCTION, INC.,

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v.

JOSE REYES, FRANCISCO REYES, JOSE PEREZ AND CARLOS FLORES,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM PERRY PENDLEY, ESQ.*
ELIZABETH GALLAWAY
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

ANDREW C. MUZI
DANA L. HARRIS
MUZI & ASSOCIATES
1851 East First Street, Suite 1257
Santa Ana, California 92705
(949) 553-9277

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Cal. Lab. Code § 1777-1780 4

Cal. Lab. Code § 1777.7 4

Cal. Lab. Code § 1778-1780 ..... 3, 4

Cal. Lab. Code § 2698 *et seq.* 4, 5

Cal. Gov. Code § 7285(a) 6

REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

ARGUMENT

I. RESPONDENTS HAVE FAILED TO DISTINGUISH THE FACTS OF THIS CASE FROM *HOFFMAN*.

Van Elk, Ltd. and Morillo Construction, Inc. (together "Van Elk") respectfully urge this Court to extend its holding in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), to this case because the pertinent facts in this case closely mirror the facts used by this Court to decide *Hoffman*. Respondents attempt to divert attention from the similarities between the prevailing wages at issue here, and the backpay they resemble, by relying on a red herring, minimum wage-based argument that is not supported by the law.

California minimum wage law relies substantially on private enforcement to prosecute violations of the minimum wage law and to deter would-be offenders. *See* Cal. Lab. Code § 1171 *et seq*. Respondents argue that prevailing wage enforcement will suffer if illegal aliens are unable to sue privately for violations. (Resp't Br. 10-11.) However, unlike minimum wage law, prevailing wage law relies almost exclusively upon state-initiated enforcement. *See* Cal. Lab. Code § 1775 *et seq*. Therefore, even if illegal aliens can no longer sue to enforce the prevailing wage law, employers will still be subject to state-initiated civil and criminal penalties. As a result,

Respondents have failed to show any material difference between *Hoffman* and this case.

In *Hoffman*, this Court explained how federal labor laws would continue to deter would-be violators of federal labor laws, even if illegal aliens could no longer sue for post-termination backpay. *See Hoffman*, 535 U.S. at 139. This Court noted that the threat of private enforcement by wronged employees was only one of multiple sanctions that would deter employers from violating the law:

> [l]ack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman – sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. Hoffman will be subject to contempt proceedings should it fail to comply with these orders. We have deemed such "traditional remedies" sufficient to effectuate national labor policy regardless of whether the "spur and catalyst" of backpay accompanies them.

Id. (internal citations omitted)

Likewise, the civil and criminal penalties of California prevailing wage law deter employers from violating the prevailing wage law by ensuring that they will not get off "scot-free" if illegal aliens cannot

privately enforce prevailing wage law. *See* Cal. Lab. Code §§ 1171.2, 1775-1780.

Respondents argue that deterrence is all but impossible absent private enforcement by employees. (Resp't Br. 10-11.) They point out that California's minimum wage law also has an enforcement scheme and suggest that private enforcement is as important to California's prevailing wage law as it is to the minimum wage law. (*Id.* at 10.) Respondents' argument fails, however, because it is unsupported by the California's statutes.

Under California law, minimum wage enforcement is neither the same nor substantially similar to prevailing wage enforcement. *See* Cal. Lab. Code § 1171 *et seq*. California's minimum wage enforcement scheme is primarily compensatory in nature and empowers both aggrieved employees and the California Division of Labor ("DOL") to maintain an action to collect unpaid minimum wages. *See* Cal. Lab. Code §§ 1193.6, and 1194, respectively. It also permits recovery of liquidated damages, and establishes a good faith defense against an award of liquidated damages. Cal. Lab. Code § 1194.2. In cases of a willful violation, the statute permits a court to grant injunctive relief. Cal. Lab. Code § 1194.5.

In contrast, the prevailing wage law has both compensatory and punitive aspects and is much tougher on employers who fail to comply with it. Like minimum wage law, it permits an aggrieved employee to sue for wages; however, it also significantly expands

the state's ability to pursue violating employers. It empowers the state to collect unpaid wages on behalf of aggrieved workers. Cal. Lab. Code § 1775. It imposes statutory penalties upon an employer to be paid to the state, *id.*, and imposes criminal sanctions for "[a]ny officer, agent, or representative of the State . . . and any contractor, or subcontractor or agent. . . ." who willfully fails to comply with the prevailing wage law. Cal. Lab. Code. § 1777. The prevailing wage law also imposes other criminal sanctions on violations, *see* Cal. Lab. Code § 1778-1780, and in some cases, denies "the right to bid on or be awarded or perform work . . . on any public works contract for a period of . . . one . . . [to] up to three years" for violating the law. Cal. Lab. Code § 1777.7.

Respondents either ignore, or fail to recognize, these key differences between California's prevailing wage law and minimum wage law. Respondents suggest that California's prevailing wage law, like its minimum wage law, will go unenforced if illegal aliens cannot sue individually. (Resp't Br. 10-11.) Yet, in under the prevailing wage statute, the state is frequently the *only* entity empowered to enforce the law. *See* Cal. Lab. Code § 1775, §§ 1777-1780. By contrast, a private individual can initiate an action to recover a shortfall in prevailing wages only under section 2698 of the California Labor Code.

This is significant because it wholly refutes Respondents' claim that, absent private enforcement, prevailing wage law will go unenforced. As the statute shows, the prevailing wage law depends almost

exclusively on state enforcement because only the state can charge violators with crimes and collect the penalties owed to the state. Respondents argue that diminished private enforcement of the minimum wage laws might weaken the deterrent effect on employers – however, even if true for minimum wages, this is not true for prevailing wages. A significantly stronger state enforcement scheme governs the enforcement of prevailing wages and the threat of criminal penalties and banishment from future public projects will continue to deter employers from violating the prevailing wage law.

Respondents' discussion of California's Labor Code Private Attorney General Act of 2004, which allows employees to enforce its labor laws by suing for any shortfall in their wages, Cal. Lab. Code § 2698 *et seq.*, is likewise irrelevant. For, even without the ability of illegal aliens to use that Act to sue civilly for prevailing wages, California is able to use a host of "traditional remedies," including State enforced civil penalties, wage differential collection and criminal sanctions, to ensure that an offending employer is held liable. *Hoffman*, 535 U.S. at 139.

Ultimately, Respondents' attempt to distinguish the facts here from those in *Hoffman* fails and Petitioners respectfully request that this Court extend *Hoffman* and foreclose the ability of illegal aliens to maintain a private civil action to recover prevailing wages. The prevailing wage law is imbued with state-initiated administrative, civil, and criminal penalties. Even if illegal aliens are no longer able to sue

individually for violations of the prevailing wage law, state enforcement scheme will insure the employers continue to comply with the prevailing wage law.

II. RESPONDENTS HAVE FAILED TO ADDRESS, LET ALONE REBUT, VAN ELK'S SUPREMACY CLAUSE ARGUMENTS.

Respondents have failed to rebut Van Elk's argument that Respondents' claims, like the illegal aliens' claims in *Hoffman*, exist only due to a violation of federal immigration law, which required that the Court of Appeals apply *Hoffman*. This failure by Respondents robs them of any basis to argue that this Court should not clarify that Congress intended, with its adoption of federal immigration laws, to bar illegal aliens from collecting prevailing wages, including those pursuant to California law.

Likewise, Respondents have failed to respond to Van Elk's argument that California – by limiting the scope of *Hoffman* by making immigration status "irrelevant" to claims under California law, Cal. Lab. Code § 1171.5(a), Cal. Gov. Code § 7285(a), Cal. Civ. Code § 3339(a) – acted in conflict with the intent of Congress, frustrated federal law, and sought to circumvent the Supremacy Clause. Moreover, Respondents have failed to demonstrate why the Court of Appeals' lenient analysis of the preemption doctrine to enable it to uphold these statutes is not in conflict with the holdings of this Court.

CONCLUSION

For the reasons set forth above and in its Petition, Van Elk respectfully requests that this Court grant the Petition to determine whether this Court's holding in *Hoffman* applies to prevailing wages and whether California's post-*Hoffman* statutes are contrary to the preemption doctrine.

Respectfully submitted,

WILLIAM PERRY PENDLEY, ESQ.*
ELIZABETH GALLAWAY
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

ANDREW C. MUZI
DANA L. HARRIS
MUZI & ASSOCIATES
1851 East First Street, Suite 1257
Santa Ana, California 92705
(949) 553-9277

Attorneys for Petitioners

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